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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 720

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, NORTHERN PACIFIC RAILWAY COMPANY, SOUTHERN PACIFIC COMPANY, AND UNION PACIFIC RAILROAD COMPANY,

Petitioners,

vs.

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL OF THE UNITED STATES,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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Petitioners,

vs.

ARTHUR E. SUMMERFIELD, Postmaster General of the United States,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on December 12, 1955.

Opinions Below

The opinion of the Court of Appeals, unreported at this time, is set forth in Appendix B to this petition. The opinion of the District Court granting petitioners' motion for

summary judgment, reported at 128 F. Supp. 266, may be found at pages 2-15 of the Joint Appendix. The opinion of the District Court denying petitioners' motion for a preliminary injunction, unreported, may be found at pages 70-71 of the Joint Appendix.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The judgment of the Court of Appeals, set forth in Appendix C, was dated and entered on December 12, 1955. A petition for rehearing and, in the alternative, for rehearing *en banc* was denied in orders dated January 27, 1956.

Question Presented

Is the Postmaster General, in transporting by air first-class mail bearing only three-cents postage, acting beyond the scope of his authority and in violation of the postal statutes which require that "all mailable matter being transported as mail by air" bear postage at the rate of "6 cents for each ounce or fraction thereof?"

Statutes Involved

The pertinent statutory provisions are set forth in Appendix A to this petition. They include: 43 Stat. 805; 46 Stat. 259; 48 Stat. 933; 52 Stat. 973 *et seq.*, 49 U.S.C. 401 *et seq.* (1952 ed.); 54 Stat. 899, 49 U.S.C. preceding section 1 (1952 ed.); 54 Stat. 1175, 39 U.S.C. 488a (1952 ed.); 60 Stat. 1062, 39 U.S.C. 462a (1952 ed.); 62 Stat. 1261, 39 U.S.C. 463a (1952 ed.); 62 Stat. 1097, 39 U.S.C. 475 (1952 ed.); 63 Stat. 680, 39 U.S.C. 470 (1952 ed.).

Statement of the Case

Petitioners are common carriers by railroad operating primarily in the western part of the United States. They are engaged in the transportation of the mail. The laws

relating to the railway postal service, 39 U.S.C. 522-579 (1952 ed.), compel them to accept any mail tendered by the Postmaster General and to provide all facilities and services necessary for its safe and expeditious movement. In consequence of these obligations imposed upon them, petitioners have invested large amounts in essential facilities for the mail service. For example, one of the petitioners, the Southern Pacific Company, has invested $25,000,000 in such facilities. (J.A. 22.)

For many years, the great bulk of ordinary first-class mail has been transported between post offices by rail. At the same time, air transportation has been used exclusively for the transportation of air mail, with the exception of a few situations where, for one reason or another, surface transportation is inadequate or unavailable and the Congress has specifically authorized air transportation of ordinary mail. Commencing in early October of 1953, however, respondent, without obtaining statutory authority from the Congress, instituted what he has described as an experimental operation in the transportation of first-class mail by air between several large metropolitan centers in the eastern and southeastern parts of the United States. (J.A. 48-50.) This so-called experimental program has continued now for over two years and has been progressively expanded to embrace transportation of first-class mail by air between numerous cities in other sections of the country. (J.A. 50-51.) Under the conditions prescribed by the Postmaster General for the operation of the experimental program, the air carriers enter the program on a voluntary basis and need to accept the mail for transportation only if they have available space remaining after satisfying other traffic demands. (J.A. 52-53.) But, in fact, there is never a lack of space. (See pp. 26-27, *infra*.)

On October 6, 1954, respondent filed a petition with the Civil Aeronautics Board requesting the Board to establish

a rate for the transportation of first-class mail by air carriers on a space-available basis between numerous points in the western part of the United States served by petitioners. (J.A. 51-52.) A temporary rate, subject to retroactive adjustment upon determination of the proper permanent rate, was set by the Board and the experimental program on the West Coast was instituted on November 22, 1954. (J.A. 52.) The program continues today under the temporary rate.

Petitioners, on November 20, 1954, filed a complaint in the District Court for the District of Columbia, requesting a declaratory judgment that respondent is without authority to transport first-class mail by air and preliminary and permanent injunctions enjoining the institution or continuance of the west-coast experimental program. The jurisdiction of the District Court was rested upon 28 U.S.C. 1339, 1331, and 1332(a)(1) (1952 ed.), and upon 11 D. C. Code 306, in each case supplemented by 28 U.S.C. 2201 (1952 ed.) and section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. 1009 (1952 ed.).

A preliminary injunction was denied by the District Court, and both sides moved for summary judgment on the basis of the pleadings and affidavits on file. The District Court found and declared that it is beyond the scope of respondent's authority to arrange for the transportation by air of any mailable matter that does not bear air-mail postage, except for experimental purposes for a period not "unduly prolonged." That court also found that petitioners have standing to sue, but failed to show that they were irreparably injured "at the moment" as a result of the operations complained of. Accordingly, the District Court granted petitioners' motion for summary judgment and entered a declaratory judgment, denied respondent's motion for summary judgment, and denied petitioners' request for a permanent injunction. (J.A. 1-2.) Both petitioners and

respondent appealed from this order. The Court of Appeals concluded that petitioners have standing to bring this suit, but that respondent has authority to arrange for air transportation of ordinary first-class mail. Consequently, the Court of Appeals ordered that the judgment of the District Court be vacated and the case remanded with instructions to grant respondent's motion for summary judgment. Judge Bastian concurred only in the result.

Reasons for Granting the Writ

1. *The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.* This case presents a novel question concerning the interpretation of federal statutes having great importance to the transportation industry, the Federal Government, and the general public. The decision will have far-reaching consequences affecting the financial well-being of large segments of the transportation industry and the operation of the postal system.

The present relatively-limited experimental programs for the transportation of three-cent mail by air have resulted in substantial revenue losses to the railroads with resultant gains to the airlines. According to testimony given in February of 1955 by the Postmaster General, approximately four million pieces of first-class mail were being transported by air daily at that time, and about $2,000,000 was paid to the airlines in 1954 alone for the transportation of such mail.[1] The loss in mail revenues to petitioners from the services already discontinued as a result of the inauguration of the west-coast program amounts to more than

[1] Hearings on Post Office Department Appropriations for fiscal 1956 before the Subcommittee of the House Committee on Appropriations, 84th Cong., 1st Sess. pp. 51, 73. During the four-week period following the inauguration of the west-coast program, a total of 1,555,508 pounds of first-class mail was transported by air between the west-coast cities involved. *Id.*, at p. 160.

$850,000 annually (J.A. 24, 32, 35, 36, 39), and the revenue loss to all the railroads affected by these experimental programs is, of course, much larger.

Furthermore, under the opinion of the Court of Appeals, there is nothing to prevent the Postmaster General from henceforth transporting all first-class mail, and, indeed, all other classes of mail, by air on a permanent basis. The railroads, therefore, are faced with the threat of a potential loss of some substantial part of revenues amounting to more than $300,000,000 a year.[2] And, the railroads are also threatened with the loss of a substantial part of their huge investment in facilities for the transportation of mail.

The continued operation of these experimental programs has, moreover, given rise to a practical problem of considerable significance to the railroads. They remain obligated to maintain in stand-by readiness all the facilities and services that may be required to move the first-class mail now being carried by the airlines, should either the Postmaster General or the airlines decide that, for any reason, the present arrangements are unsatisfactory. On the other hand, so long as it remains completely uncertain what percentage of the mail is to be diverted to the airlines and what, if any, limitations must be observed in that connection, it is impossible to justify making the investments necessary to maintain and replace the facilities required of the railroads for the transportation of the mail.

The great bulk of mail transported by rail is carried in passenger trains. (J.A. 22, 39.) As this Court is well aware, passenger-train service has operated under increasingly severe economic handicaps. The maintenance of an adequate system for the transportation of pas-

[2] See, e.g., the railway mail pay estimates submitted to the Appropriations subcommittees for fiscal 1956. Hearings on Post Office Department Appropriations for fiscal 1956 before the Subcommittee of the House Committee on Appropriations, 84th Cong., 1st Sess., p. 161; Hearings on Post Office Department Appropriations for fiscal 1956 before the Subcommittee of the Senate Committee on Appropriations, 84th Cong., 1st Sess., p. 62.

sengers by rail is one of the most vexing problems facing the nation's transportation industry, and is of great importance not only to the citizens that utilize that service, but also to the national defense. Rail service is extensively utilized for the movements of troops and the passenger-train service has been among our most vital assets in times of grave national emergencies. The material reduction in passenger-train revenues resulting from a shift of three-cent mail transportation to the airlines must ultimately result in the discontinuance of many passenger trains now in operation. (J.A. 22-23, 25, 33, 41.)

The consequence, if we are right on the merits, will be that the Postmaster General, disregarding the instructions of the Congress and with an eye only to the postal service, will have done serious damage to the fundamental national transportation policy of the Congress.

Implicit in the entire scheme of postal legislation is a recognition that the postal service is more than a business providing the public with a means for the delivery of its letters and packages. The maintenance of a postal service represents, also, a governmental function and the Congress has often required that this function be conducted so as to serve governmental purposes unrelated to the most efficient and rapid delivery of mail at the lowest possible cost. Thus, the belief of the Congress that all means of transportation must be maintained in a healthy, well-functioning condition is expressed in the National Transportation Policy of "developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense." 54 Stat. 899, 49 U.S.C. preceding section 1 (1952 ed.). The use of mail pay has always been recognized by the Congress as an important means of achieving this objective.

A decision that permits the Postmaster General in his discretion to arrange for the transportation of mail without giving adequate consideration to the ends that the Congress has sought to achieve in both postal and transportation legislation is obviously of great significance and deserves scrutiny by this Court.

We do not claim that the decision of the Court of Appeals on the merits conflicts with a decision of any other court. But, as we show in the next section, that court departed radically from the accepted cannons of statutory construction prescribed by this Court in many decisions. Moreover, this is not a situation in which this Court can wait for a conflict to develop, with the assurance that it will develop if the question is really important and well-justified differences of view are possible. The decision in this case will in all probability be the final word on the construction of the statutes under consideration, as the matter cannot be raised in any other circuit. The Postmaster General, against whom suit must be brought, resides in the District of Columbia, and venue in a civil action wherein jurisdiction is not founded solely on diversity of citizenship may be laid "only in the judicial district where all defendants reside." 28 U.S.C. 1391(b) (1952 ed.); *Scientific Mfg. Co.* v. *Walker*, 40 F. Supp. 465 (M.D. Pa.). Therefore, this important question of federal law which has not been, but which should be, settled by this Court must be settled in this case, if at all. See *Muncie Gear Co.* v. *Outboard Co.*, 315 U.S. 759, 766; *Exhibit Supply Co.* v. *Ace Corp.*, 315 U.S. 126, 128; *Schriber Co.* v. *Cleveland Trust Co.*, 305 U.S. 47, 50.

Review by this Court under these circumstances is especially indicated since, as we show in the next section, the decision of the Court of Appeals is plainly erroneous and frustrates a long-standing Congressional policy of maintaining a substantial postage-rate differential between

mail transported by air and mail transported on the surface.

2. *The decision of the Court of Appeals is erroneous.* The position of petitioners on the merits, summarily stated, is as follows: The plain language of the relevant statutes, the legislative history of those statutes, the entire course of air-mail legislation, and the settled administrative construction of that legislation prior to the inauguration of the programs under attack make a uniform showing. They establish that the consistent Congressional policy has been, and is, to limit air transportation of mail to mail bearing the premium air-mail postage, with the exception of a few specific situations, expressly provided for by statute, where surface transportation is inadequate or impractical.

Despite the refusal of the Court of Appeals to accord the relevant statutes their literal meaning, because, in its view, the literal meaning was contrary to the Congressional intent, its opinion ignores most of the pertinent legislative history of those statutes and fails to relate them to other postal legislation and the course of development of air-mail legislation. It is necessary to deal with those matters at some length in this petition because the opinion below gives little or no aid in placing the issues in their relevant context.

a. *The relevant statutes.* The Congress in the Act of August 14, 1946, 60 Stat. 1062, provided that " 'domestic air mail' shall embrace all mailable matter being transported as mail by air within the continental United States, within any Territory or possession of the United States, within any geographical area which is a protectorate of the United States, or between any of the aforesaid." 39 U.S.C. 462a (1952 ed.). The same statute, in a section carried into the Code as 39 U.S.C. 463a (1952 ed.), provided that "the rate of postage on all domestic air mail *as defined in section 462a of this title* shall . . . be 6 cents for each ounce

or fraction thereof."[3] (Emphasis supplied.) The statutory language is unambiguous and its meaning is plain—any mail transported by air must bear the air-mail postage of six cents per ounce. This Court has held that unambiguous statutory language is to be given its ordinary, literal meaning, unless there is a strong showing that a literal construction would be contrary to the intent of the Congress. *Gemsco, Inc.* v. *Walling,* 324 U. S. 244, 260; *Sturges* v. *Crowinshield,* 4 Wheat. 122, 202-203; see *Employees* v. *Westinghouse Corp.,* 348 U.S. 437, 444. And, as we show below, the evidence is overwhelming that the language chosen by the Congress reflects exactly the intent of the Congress.

b. *The legislative history.* The Court of Appeals did not deny that the Act of August 14, 1946 on its face bars air transportation of first-class mail. The court nevertheless refused to give the statute its literal meaning on the ground that such was not the intent of the Congress. In reaching this conclusion, the court relied almost entirely on prior definitions of "air mail" in the Air Mail Acts of 1925 and 1934. In the Air Mail Act of 1925, 43 Stat. 805, "air mail" was defined as "first-class mail prepaid at the rates of postage herein prescribed." In the Air Mail Act of 1934, 48 Stat. 933, "air mail" was defined as "mail of any class prepaid at the rate of postage prescribed in subsection (a) of this section." (Both statutes prescribed premium postage for "air mail.") Relying on a reading of this language isolated from its context, legislative history, and practical construction, the court below concluded that the distinguishing characteristic of air mail is not that "the Post Office transports [it] by air," but that "the sender has affixed [to it] special postage." (In short, the purchase price rather than the character of

[3] The 1946 Act provided for a postage rate of five cents per ounce. This was subsequently increased to six cents. 62 Stat. 1261.

service becomes the critical distinction between air mail and ordinary mail.) Hence, the argument proceeds, if we understand it correctly, as air mail is not distinguished from ordinary mail because it moves by air but because it carries six-cents postage, there is no bar to moving ordinary mail by air under these earlier definitions. "If that view is correct," the court continued, "the statutory definition of 'domestic air mail' [in the 1946 Act] does not preclude the Post Office from transporting by air matter other than 'air mail.' It must, generally speaking, transport by air matter to which the special postage has been affixed, but it is not required to demand the special postage for all matter which it transports by air."[4] The court thus read out of the 1946 definition of "domestic air mail" the words "all mailable matter being transported as mail by air," justifying its disregard of the plain words of the Act because the legislative history does not "mention any intent to circumscribe or change the then existing powers of the Postmaster General" with regard to the transportation of mail by air and in "the absence of clear indication of a Congressional intent to discard the established definition, we think the view urged by the railroads is untenable."[5]

This is the first time to our knowledge that a court has taken the position that where the plain language of a statute conflicts with an earlier statute, the subsequent enactment is to be ignored unless it can be affirmatively shown from the legislative history that the Congress intended what

[4] See Appendix B, p. 43, *infra*.

[5] See *Appendix* B, pp. 49, 44, *infra*. The Court of Appeals correctly concluded from the legislative history that the Congress in the 1946 Act intended to reduce the disparity between the "premium air-mail rate" then in effect and the "surface rate" and to extend the continental air-mail rate to the territories. But to hold that these were the sole purposes of the Act is to deny the words "all mailable matter being transported as mail by air" any effect whatsoever. Certainly, this language is not a "geographical description" and has nothing to do with the relationship between air-mail and surface-mail postage rates.

it said. The rule prescribed by this Court is that while repeals by implication are not favored, the later statute will be given effect when there is a clear inconsistency with an earlier act.[6] *Georgia* v. *Pennsylvania R. Co.* 324 U.S. 439, 456-457; *United States* v. *Yuginovitch,* 256 U.S. 450. Although a change in terminology will not be held to show a change in the Congressional intent when there is "more persuasive evidence" in the legislative history that a change was not intended, *United States* v. *Dickerson,* 310 U.S. 554, 561, in the absence of such evidence it will be presumed that a change was intended. *Brewster* v. *Gage,* 280 U.S. 327, 337; *Crawford* v. *Burke,* 195 U.S. 176, 190.

In any event, the failure of the legislative history to indicate affirmatively that the law was being changed is readily explainable by the fact that no change was involved—the law has always been, except in limited circumstances under express statutory provisions, that only air mail can be transported by air. The reports and hearings on the 1946 Act show conclusively that the Congress, in considering and enacting that statute, was of the view that under the then-existing law "air mail" included all mail transported by air and that mail not bearing air-mail postage could be transported only by surface means. Thus, in S. Rept. No. 1834, 79th Cong., 2d Sess., at p. 2, it is stated that:

> "The experience of the postal service indicates that the disparity between the *surface rate for first-class mail of 3 cents per ounce and the premium air-mail rate of 8 cents per ounce* is too great for matter other than that of high time value. Furthermore, evidence was introduced at the hearings which indicates that a penalty has been placed upon the use of air mail by

[6] The various definitions are not inconsistent. If the prior definitions of "air mail" are read into the definition of "domestic air mail", as suggested by the Court of Appeals (Appendix B, p. 49, *infra*), the sense of the 1946 Act would not be changed. It would read: "first-class mail [or mail of any class] prepaid at the rates of postage herein prescribed shall embrace all mailable matter being transported as mail by air."

the 8-cent rate which is all out of proportion as between postage rate and postal cost.

"Cost-ascertainment computations indicate that *air mail at a 5-cent rate* would return a slightly higher net profit per pound than does *ordinary first-class mail at the surface rate of 3 cents.* Therefore, H. R. 5560 proposes to remove the penalty and put these *two services, surface and air,* on approximately equal footing—the mailer to take his choice in accordance with the importance of his communications, without being deterred by an excessive air-mail postage rate.

* * * * * * *

". . . The 5-cent rate proposed by H. R. 5560 would restore the privilege [of using air mail] . . ., and at the same time high-speed service will be afforded to those patrons who must forego its use as long as *the differential between surface and air service remains as 3 to 8 cents.*" (Emphasis supplied.) [7]

That the 1946 Act in defining "domestic air mail" to include "all mailable matter being transported as mail by air" merely made explicit what had theretofore been clearly implicit, and that, as the Congress assumed in enacting the 1946 law, the Postmaster General has never had a general authority to transport all classes of mail by air, is also clear from the statutory context, legislative history, and settled administrative construction of the prior definitions of "air mail," and from the entire course of air-mail legislation. This material, which was ignored in the opinion of the Court of Appeals, is discussed in the following sections.

c. *The prior air-mail legislation.* Respondent, of course, must do more than show that the Congress has not prohibited the transportation of first-class mail by air. He must

[7] See also, H. Rept. No. 1986, 79th Cong., 2d Sess., p. 2; Hearings on H. R. 5560 before the Senate Committee on Post Offices and Post Roads, 79th Cong., 2d Sess., pp. 32, 40, 61.

also establish that the Congress has affirmatively authorized such transportation. *Beach* v. *United States*, 226 U. S. 243. The Air Mail Act of 1925, the first general statute providing for private transportation of mail by air, empowered the Postmaster General to contract "for the transportation of air mail by aircraft" and also "for the transportation by aircraft of first-class mail other than air mail." The legislative history of the Act reveals that it was understood that ordinary first-class mail would be carried only when there was insufficient air mail to make up a capacity load. See 66 Cong. Rec. 751. A 1930 amendment, 46 Stat. 259, retained the definition of "air mail" in the 1925 Act, but expressly restricted air transportation of first-class mail to that necessary to utilize space contracted for that could not be used for air mail.[8]

The Air Mail Act of 1934 provided only for "the transportation of air mail by airplane," and thus eliminated the limited prior authority of the Postmaster General to transport first-class mail by air. The intentional repeal of this prior authorization denotes that the Congress intended by the Air Mail Act of 1934 to restrict air transportation of mail to air mail,[9] as defined in the Act, and respondent admitted before the Court of Appeals that this was the effect of the statute.[10] The Comptroller General has also ruled that the 1934 Act did not permit air transportation of first-class mail. No. A-74912, 15 Comp. Gen. 1025.

[8] When, in 1930, revision of the 1925 Act was under consideration, the Postmaster General testified that it was necessary to retain a provision authorizing air transportation of non-air mail in order to permit any utilization of this excess space. Hearings on H.R. 9500 before House Committee on Post Offices and Post Roads, 71st Cong., 2d Sess., pp. 12-17.

[9] The committee reports on the 1934 Act also indicate that it was intended to provide only for transportation of air mail. S. Rept. No. 574, 73rd Cong., 2d Sess.; H. Rept. No. 1428, 73rd Cong., 2d Sess.; H. Rept. No. 1754, 73rd Cong., 2d Sess. (Conference Report).

[10] At page 40 of his main brief filed with the Court of Appeals, in footnote 29, it is stated that: ". . . from 1934 to 1938 Alaska was the only area where the Postmaster General could contract for the transportation of all classes of mail by air."

Hence, the definitions of "air mail" enacted by the Congress in the 1925 and 1934 Acts, when viewed in the light of their statutory context, legislative history, and settled administrative construction, lend no support to the conclusion of the court below that the Postmaster General could transport all classes of mail by air prior to the Act of August 14, 1946. Rather, their origin in statutes that admittedly limited air transportation of mail to air mail except, in the case of the 1925 Act, where the use of first-class mail was necessary to fill excess space contracted for, confirms petitioners' view that the Congress has never authorized the Postmaster General to transport ordinary mail by air except in limited circumstances where expressly authorized.

Respondent contended before the Court of Appeals that authority for the transportation of three-cent mail by air is given by the provisions of the Civil Aeronautics Act of 1938[11] amending the post roads statute (39 U.S.C. 481-483 (1952 ed.)) to include "air routes," authorizing the Postmaster General to tender mail to certificated air carriers, and defining "mail" as used in the Act to include "United States mail and foreign-transit mail," without express limitation to air mail. Here again, however, the contention ignores the statutory context and legislative history of the Act, and is rested on language much more ambiguous than that found in the Act of August 14, 1946 which the Court of Appeals refused to give its ordinary meaning.

The Civil Aeronautics Act was primarily intended as a broad and comprehensive charter governing federal regulation of air transportation.[12] It is natural, therefore,

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[11] 52 Stat. 973 *et seq.*, 49 U.S.C. 401 *et seq.* (1952 ed.). Although its opinion is not entirely clear on this point, the Court of Appeals apparently did not rest its conclusion that the Postmaster General has authority to transport first-class mail by air on these provisions, but only regarded them as being "consistent" with its conclusion. See Appendix B, p. 46, *infra*.

[12] See the declaration of policy, 52 Stat. 980, 49 U.S.C. 402 (1952 ed.).

that in placing air carriers on a common-carrier basis and requiring them to transport mail tendered by the Postmaster General, the draftsmen of the statute defined "mail" *for purposes of the Civil Aeronautics Act* in the broadest terms. That Act was expected to remain substantially unchanged for the foreseeable future, and the provisions of the postal statutes, Title 39 of the Code, regulating the kinds of mail that the Postmaster General could transport by air very possibly would be varied substantially throughout the years to come as they had been in the past. By broadly defining "mail" for purposes of the Act, the Congress could assure that whatever the extent of the authority of the Postmaster General to arrange for the transportation of mail by air under the postal statutes at any particular time, the airlines could, under the Civil Aeronautics Act, be compelled to transport such mail. It is clear, both from the context of the Act and from its legislative history, that the Congress intended to do no more than this; the Postmaster General's authority was to remain limited to arranging for air transportation of mail bearing air-mail postage, as had been the case since 1934.

While the Civil Aeronautics Act repealed the provisions of the Air Mail Act of 1934 authorizing the Postmaster General to contract for air transportation of air mail and substituted a common-carrier obligation of certificated air lines to move mail tendered by the Postmaster General, section 1107(k) of the Civil Aeronautics Act excepted from repeal sections 2(a) and 2(b)(1) of the earlier Act. Section 2(a) fixed the air-mail postage rate and section 2(b)(1) contained the definition of "air mail." Thus, the draftsmen of the Civil Aeronautics Act carefully left in effect the key provisions of the 1934 Act that established a special air-mail service to which alone air transportation was, under that Act, available. Moreover, in section 405(k) of the Civil Aeronautics Act, 49 U.S.C. 485(k) (1952 ed.),

the Congress expressly empowered the Postmaster General to contract "for the transportation by aircraft of *any or all classes* of mail to or from localities affected" by calamitous visitations. (Emphasis supplied.) This use of the language "any or all classes of mail" is under respondent's theory explainable only in terms of negligent drafting. If, as respondent contends, the Congress took pains to define "mail" so as to include any or all classes of mail, with reference to the Postmaster General's authority to provide air transportation for mail, then it would be expected to have used the defined term rather than spelling out "any or all classes of mail" in section 405(k). If on the other hand, as we contend, section 405(g) is intended only to obligate the airlines to move such mail as the Postmaster General, under authority of the postal laws, tenders them, then the use of "any or all classes of mail" in section 405(k) is readily explainable as authorizing the Postmaster General, in emergency circumstances, to arrange, as he would not otherwise be authorized to arrange, for air movement of "any or all classes of mail".

The legislative history of the Act likewise demonstrates that the Congress did not intend to broaden the Postmaster General's authority with respect to the kinds of mail that he could arrange to transport by air. Two of the bills that preceded the one finally enacted as the Civil Aeronautics Act (H.R. 5234, 75th Cong., and S. 2, 75th Cong.) defined "mail" as mail prepaid at the airmail postage rate. Clearly, those bills were not intended to remove the restriction in the Air Mail Act of 1934 against the transportation by air of non-air mail, as respondent conceded before the Court of Appeals.[13] H.R. 5234 was

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[13] At page 30 of his main brief filed with the Court of Appeals, the cited bills are referred to with the statement that "the restriction to air mail" required by the definition of "mail" in those bills was eliminated in the statute as enacted.

amended and reintroduced as H.R. 7273, 75th Cong. The latter bill dropped the definition of "mail" but expressly left in effect the similar definition of "air mail" contained in the Air Mail Act of 1934. That this bill was intended to authorize air transportation only of air mail is plain from the House Report (No. 911, 75th Cong., 1st Sess.) where it is stated, at p. 18, that: "Rates for the carriage of *air mail* would be fixed by the Commission." (Emphasis supplied.)

Various objections to the bills already introduced caused the President to appoint an Interdepartmental Committee on Civil Aviation to consider the matter. The Interdepartmental Committee drafted a bill, introduced as H.R. 9738, 75th Cong., that was virtually identical to the Civil Aeronautics Act, including the definition of "mail." A representative of the Interdepartmental Committee in pointing out the 19 "major differences in policy" between H.R. 9738 and the previous bills did not indicate in any way that H.R. 9738 was intended to broaden the provisions of the earlier bills to permit transportation by air of all classes of mail.[14] On the contrary, he used the terms "mail" and "air mail" interchangeably in discussing the provisions relating to the transportation of mail in H.R. 9738 and in a companion bill, S. 3760, 75th Cong.[15] We have not discovered any reference in the legislative history of the Civil Aeronautics Act to an intention to change the policy expressed in the 1934 Act of requiring that all mail transported by air bear the air-mail postage rate. This can hardly be accidental in view of the importance of the matter and the thoroughness of the consideration given by the Congress to that legislation.

Both the Congress and the Postmaster General, shortly

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[14] Hearings on H.R. 9738 before House Committee on Interstate and Foreign Commerce, 75th Cong., 3d Sess., pp. 37-46.

[15] *Ibid;* Hearings on S. 3760 before the Senate Committee on Commerce, 75th Cong., 3d Sess., pp. 1-4.

after the enactment of the Civil Aeronautics Act, were clearly of the view that that Act did not give the Postmaster General authority to transport all classes of mail by air. The Civil Aeronautics Act had repealed the Act of August 24, 1935, 49 Stat. 744, which had given the Postmaster General authority to contract for the transportation by air of all classes of mail in Alaska. In 1940, the Postmaster General submitted to the Congress a request for enactment of a bill permitting the transportation by air of all classes of mail in Alaska, since the repeal of the earlier Act had:

> ". . . left the Department without specific authority to continue the transportation of all classes of mail by aircraft in Alaska and legislation is regarded as very necessary to permit of the continued transportation of all classes of mail by aircraft in the Territory without conflict with the Civil Aeronautics Act of 1938." H. Rept. No. 2736, 76 Cong., 3rd Sess., p. 3.

Congressional debate on this bill made clear that both the Post Office Department and the Congress were of the view that only air mail could be tendered to air carriers certificated under the Civil Aeronautics Act.[16] The Con-

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[16] Mr. Dimond:

"When the Civil Aeronautics Act with respect to air mail was passed recently, one provision of the Act said that the existing contracts for the carriage of all classes of mail in Alaska would be continued in effect until the Civil Aeronautics Authority should apply the Act to Alaska by issuing certificates of public convenience and necessity and prescribing rates of compensation. Up to the present moment no such certificate has been issued for any of the routes carrying all classes of mail by air.

"The Civil Aeronautics Authority now desires to put the act into effect in Alaska, and if that is done all existing mail contracts for carriage of mail by air will be cancelled. *Under the Civil Aeronautics Act it is possible to carry air mail only, as is said by the Post Office Department;* therefore the Post Office Department would in that event be required to carry other classes of mail by dog teams or horses, at a much greater cost to the Government.

"The purpose of this bill is to permit the continuance of the carriage of

gress thereupon enacted a law, 54 Stat. 1175, 39 U.S.C. 488a (1952 ed.), substantially in the terms proposed by the Postmaster General, providing that, when required by the Postmaster General, air carriers certificated under the Civil Aeronautics Act to engage in the transportation of mail in the Territory of Alaska "shall . . . transport, in addition to mail on which [air-mail] postage shall have been paid . . ., *any other classes* of mail bearing the appropriate postage for its respective class, and the Postmaster General is authorized to require such transportation." (Emphasis supplied.)

The Court of Appeals did not attempt to explain why this specific statutory authorization was necessary if the Postmaster General has a broad, discretionary authority to transport by air any class of mail whether or not it bears air-mail postage, and, indeed, there is no satisfactory explanation other than that the Congress has always considered air transportation to be limited to air mail except when otherwise provided by specific statutory language.

The Court of Appeals did express concern that "to accord 'domestic air mail' the meaning urged by the railroads would give rise to serious statutory conflicts" with the spe-

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all classes of mail in Alaska by air under the Civil Aeronautics Act just the same as is the case at the present time, and it will put the full control in the hands of the Civil Aeronautics Authority. . . ."

Mr. Martin of Massachusetts:

"It is not really necessary to have this legislation. This compels them to transport mail by air, whereas it would be optional otherwise?"

Mr. Dimond:

"No it would not be optional. In the opinion of the Solicitor of the Post Office Department, as I understand, if the Civil Aeronautics Authority puts the Civil Aeronautics Act completely in effect in Alaska, it would no longer be possible to carry all classes of mail by air and it would be necessary to go back to the old and more costly method of carrying all except air mail on the ground by dog teams or on horseback or in some other kindred fashion." 86 Cong. Rec. 9680. (Emphasis supplied.)

cial statutes permitting the Postmaster General to transport by air "any or all classes of mail" in certain limited situations, in that to construe the Act of August 14, 1946 as requiring that all mail transported by air bear air-mail postage would "nullify these prior statutes." Appendix B, at pp. 44-45, *infra*. But, this ignores the general rule of statutory construction that "where there are two statutes, the earlier special and the later general, the special controls the general, and the fact that one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general. The general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special. Rogers v. United States, 185 U. S. 83. . . ." *Baltimore & O. R. Co.* v. *Chicago River & Indiana R. Co.*, 170 F.2d 654, 658 (C.A. 7).[17] It seems to us that the Court of Appeals might much more appropriately have been concerned with the question of why the Congress bothered to enact these special statutes if the Postmaster General has a broad, discretionary authority to transport all classes of mail by air under the provisions of the Civil Aeronautics Act.

d. *The subsequent air-mail legislation.* The events leading up to the enactment of legislation authorizing an air parcel-post service illustrate that both the Post Office Department and the Congress, after the passage of the Act of August 14, 1946, understood that the Department did not have a general authority to transport non-air mail by air, even on a space-available basis. In 1948, some of the payments to air carriers for mail transportation were based

[17] Moreover, once it is recognized that the Congress has always accepted the principle that non-air mail can be carried by air only when expressly authorized and that the 1946 Act merely reaffirmed this principle in explicit terms, the apparent conflict disappears entirely.

on minimum load guarantees, millions of ton-miles of which were not being used because of insufficient air-mail volume. The Postmaster General did not fill this extra space with first-class mail or ordinary parcel post since he considered that this would be beyond his statutory authority. The Congress shared this view, as is evident from the following comments in H. Rept. No. 2163, 80th Cong., 2d Sess., p. 2:

> "The Civil Aeronautics Board has recently been establishing rates upon the volume of mail. They have accomplished this by setting minimum load requirements upon which the Post Office Department pays the ton-mile rate established for the particular carrier. These minimum load requirements have been revised consistently upward till now they are at the point where the *Post Office is paying for a large amount of space which they cannot use under present laws and conditions.* The establishment of this service [parcel post] will create an additional volume of mail which will utilize this space at no extra cost to the Post Office Department." (Emphasis supplied.)

The Congress, therefore, enacted the Air Parcel Post Act, 62 Stat. 1097, 39 U.S.C. 475 (1952 ed.), establishing a premium "rate of postage on mailable matter exceeding eight ounces in weight, but not weighing more than seventy pounds nor measuring more than one hundred inches in length and girth combined, *when carried by air.*" (Emphasis supplied.)

The same understanding by the Postmaster General and by the Congress was shown as recently as 1949. The Air Star Route Act, 52 Stat. 219, enacted by the same Congress that enacted the Civil Aeronautics Act, had authorized the Postmaster General to award contracts "for the transportation of any or all classes of mail by airplane upon star routes not over two hundred airplane-miles in length" where necessary because of the inadequacy or imprac-

ticability of surface transportation. In 1949, the Postmaster General requested the Congress to remove the restriction limiting to 200 miles or less the length of such air star routes, since:

> "The certification of air routes under provisions of the Civil Aeronautics Act of 1938, as amended, is not justified in most of the areas herein considered because, *when restricted to air mail bearing the airmail postage rate,* the volume would not be sufficient to warrant the high cost of conventional certified service. On the other hand, if the service were obtained for all classes of mail at a competitive contract rate, the cost might be reasonable and fully warranted." H. Rept. No. 563, 81st Cong., 1st Sess., p. 3.

Consequently, the Congress amended the Act to remove the restriction and permit the Postmaster General to "award contracts for the transportation by aircraft upon star routes of *any or all classes* of mail *(including but not limited to air mail and air parcel post)"* where surface transportation is impracticable or inadequate. (Emphasis supplied.) 63 Stat. 680, 39 U.S.C. 470 (1952 ed.).

e. *Administrative construction of the air-mail statutes.* Until the inauguration of the recent experimental programs for the transportation of three-cent mail by air, the consistent view of the Post Office Department had been that only air mail could be transported by air except in the special situations covered by statute. We have already noted repeated instances in which the Department advanced this restriction as grounds for the enactment of legislation authorizing air transportation of all classes of mail, as the Alaska and Air Star Route Acts, or of particular classes of mail not bearing the normal air-mail postage, as the Air Parcel Post Act.

The Department's regulations and its Postal Guide, be-

fore the institution of these experimental operations, also indicated that only air mail could be transported by air under the general authority of the Department. "Domestic air mail" was defined in the regulations in precisely the statutory language as "all mailable matter being transported as mail by air," 39 C.F.R. 34.89(a) (1949 ed.), and it was provided that the "rate of 6 cents an ounce . . . will apply to all domestic air mail." 39 C.F.R. 34.88(b)(2) (1949 ed.). The U.S. Official Postal Guide, Part I, dated July 1953, under Chapter III entitled "Domestic Mail Matter," carried the following Article 12:

> "12. *Air Mail and air parcel post rates.*—The rates of postage in this article apply to *mail transported by air* in the domestic mails. (See arts. 2 and 3 of this chapter).
>
> (a) *Letters and packages,* not exceeding 8 ounces are chargeable with postage at the rate of 6 cents an ounce or fraction of an ounce. Air post and postal cards are acceptable at 4 cents each.
>
> (b) *Air Parcel Post.* Parcels exceeding 8 ounces, but not exceeding 70 pounds, which may include any class of mail matter intended for air transportation, are subject to the rates shown in the following schedule, according to zone location and weight . . ."
>
> (Emphasis supplied.)

f. The priorities allegedly accorded air-mail. The Court of Appeals, in support of its views as to the authority of the Postmaster General to transport three-cent mail by air, suggested that the distinguishing feature of a "real air-mail service" for which air-mail postage is to be charged is that it "involves many priorities" and that "the carriers must transport this mail on an imperative priority basis." Appendix B, p. 45, *infra.* The court reasoned that since

the three-cent mail is tendered to the air lines on a space-available basis, such mail does not receive a "real air-mail service" justifying the higher air-mail postage charge.[18] Respondent, in the court below, advanced a similar contention and referred to priorities allegedly accorded air mail in handling and distribution in the post offices, at terminals and transfer points, and in transportation.

The Court of Appeals advanced those "considerations" only as a "support" for its conclusions already reached, and did not suggest that, standing alone, they would provide an alternative ground for its decision. The frailty of this support becomes clear once the nature of the legislation respecting air mail is considered. From the beginning of the service to date the legislative provisions respecting air mail have been confined basically to a definition of air mail, a prescription of air-mail postages rates, and authority to contract for or require on a common-carrier basis the air movement of such mail. Prior to the 1946 Act, air mail was defined as first-class mail, or as mail of any class, prepaid at the premium air-mail rate. In the 1946 Act, the definition became all mailable matter transported as mail by air and it was prescribed that such mail should carry the premium rate.

It cannot reasonably be denied that by these provisions the Congress intended to establish an air-mail service. That service was intended to be entirely distinct from the

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[18] The Court of Appeals stated that "so far as the record indicates, the variation in cost between carriage by rail and carriage by air on a non-priority, space-available basis is not substantial." It should be pointed out that permanent rates for the transportation of three-cent mail by air under the west-coast program in question here have not yet been fixed by the Civil Aeronautics Board. The mail is now being flown under temporary rates subject to retroactive adjustment when the proper permanent rates are determined, so that at this time the cost of air transportation is uncertain. Petitioners believe that it will eventually exceed the cost of rail transportation by a considerable margin.

service provided for first-class mail. Respondent conceded as much in the courts below. Presumably, respondent also would not contest the proposition that the Congress was not practicing a fraud on the American people. When it exacted a double price for air-mail service, it intended to give in return something reasonably worth double the price of ordinary first-class mail. But while respondent conceded that these statutory provisions obligate him to provide an air-mail service distinct from and considerably better than that accorded in the first-class mail service, he asserts that this distinction does not lie in the air movement of air mail as distinguished from surface movement of other classes of mail.

What respondent says is that in providing for air mail the Congress intended to establish a distinct service, but the distinction intended is some difference in the priorities accorded the two classes of mail while handled on the ground. In the affidavits filed on behalf of respondent in this proceeding, the only substantial priority claimed to be accorded an air mail letter that is not also received by an ordinary first-class letter transported by air between the same points is that the air carrier must accept the air mail letter while it need accept the first-class letter only if space is available on the flight after satisfying other demands. [19]

In point of fact, it appears that this co-called priority is largely illusory, since the air carriers always have more than enough space available. Thus, Member Gurney of the

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[19] The affidavit of Postmaster General Summerfield mentions only the fact that the air carrier may reject first-class mail if space is not available. (J.A. 46.) The affidavit of Assistant Postmaster General Seidle does refer to certain differences in the handling of the mails by post office personnel, but on analysis these differences amount in substance to little more than recognition of the possibility that the three-cent mail may be rejected by the air carrier if space is not available. (J.A. 53-55.)

Civil Aeronautics Board, dissenting in *Surface Mail by Air Exceptions*, Docket Nos. 6882, 6905, and 6940 (decided May 2, 1955), stated: ". . . that so far as the Board is aware, *there has never been a single pound of surface mail refused for lack of space* by the certificated carriers." (Emphasis in the original.) And, in a recent press release, the Post Office Department announced that *all* mail between many of the major cities served by the experimental programs is transported by air.[20]

It seems clear that the possibilities that space will not be available are sufficiently remote and any other priorities accorded air mail are so inconsequential as completely to negative any suggestion that such are the differences intended by the Congress to justify the double postage rate imposed on air mail. But even if today those distinctions were significant, there is nothing in the statutes to prevent the Postmaster General from tomorrow giving three-cent mail the same handling on the ground as is given air mail. There is no reference to such priorities in the entire thirty years of legislation relating to air mail, either in the terms of any statute or, insofar as we could find, in the legislative history of any statute.[21]

That the Congress considered air transportation to be the distinctive characteristic of air mail justifying the premium postage rate charged therefor, rather than priorities in handling on the ground, is obvious from its use of the descriptive adjective "air." The provisions in the

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[20] Post Office Department Press Release No. 229, dated October 6, 1955.

[21] While the postal regulations direct that air mail is to receive expeditious treatment, neither those regulations nor the Postal Guide ever provided, until this controversy arose, any basis for an assertion that such expeditious handling is the critical factor distinguishing air mail from other classes of mail. See pp. 23-24, *supra*.

postal statutes relating to "special delivery" and "special handling" of mail reveal that the Congress knows how to provide for, and label, mail that is to receive priorities in handling on the ground for which an extra charge is made, when it so desires. See 39 U.S.C. 164-169a, 246f, 276d, 292a(f) (1952 ed.). If air transportation is not limited to air mail, then the Congress in providing for air mail has enabled the Postmaster General to collect a double charge from an unsuspecting public for a service that the Congress did not require be essentially different from that which a letter would receive at the ordinary postage rate. It seems clear that a decision attributing such an intention to the Congress should be reviewed by this Court.

It is apparent that respondent's present experimental programs have already confused the distinction between air mail and first-class mail, and that, under the opinion of the court below, he may erase altogether any differences between the two services. It is inconceivable to us that the Congress ever intended to entrust to the Postmaster General this power virtually to destroy a mail service for which it has long expressly provided by statute, especially in view of the frequently expressed Congressional concern with maintaining and increasing revenues from air mail and with eliminating the postal deficit.[22]

g. The Congress has not ratified the operation in question. We will touch quickly on the Congressional ratification argument advanced by respondent since it is referred to in the opinion of the Court of Appeals. Essentially, this argument is that Congressional approval and ratification of the experimental programs should be inferred from references to the programs in various committee reports and

[22] See, e. g., H. Rept. No. 416, 83rd Cong., 1st Sess., pp. 20-21; S. Rept. No. 373, 83rd Cong., 1st Sess., p. 4; H. Rept. No. 2619, 83rd Cong., 1st Sess., p. 1; H. Rept. No. 1252, 83rd Cong., 2nd Sess., pp. 4-5; H. Rept. No. 2358, 80th Cong., 2d Sess., p. 4; S. Rept. No. 1834, 79th Cong., 2d Sess.

hearings and from a one-sentence proviso in an appropriations act, 68 Stat. 148, requiring the Postmaster General to report the total cost of "the eliminated and replacement service for airline, truck and railroad transportation." The Court of Appeals did not conclude that these limited activities constituted a Congressional ratification of the respondent's experimental programs, and could not properly have done so, since such incidental activities in no wise comprise the express recognition and approval of administrative action that has been found to amount to Congressional ratification of such action in cases like *Fleming* v. *Mohawk Co.*, 331 U. S. 111, and *Brooks* v. *Dewar*, 313 U. S. 354.

But, the court below did state that "the indications of implied legislative approval are entitled to weight." Appendix B, p. 47, *infra*. In this, the court is clearly in error. The Congress has either ratified this experimental program or it has not done so. Both lower courts properly found that it had not done so. If there had been ratification that would be the end of the matter. As there has not been ratification, no help can properly be derived from the facts upon which respondent urged that ratification could be found, just as no effect can be given a bill that is considered but not enacted by the Congress.

Conclusion

This is a test case presenting a novel question of federal statutory construction having great importance to the transportation industry in general and to the public, as well as to the litigants. The decision in this case will, in all probability, be the final word on the authority of the Postmaster General to transport all classes of mail by air under the existing statutory provisions. The opinion of the Court of Appeals is demonstrably erroneous, and the

matter is one that should be finally, and correctly, settled by this Court. Accordingly, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Statutes Involved

Air Mail Act of 1925, 43 Stat. 805:

Sec. 2. That when used in this Act the term "air mail" means first-class mail prepaid at the rates of postage herein prescribed.

Sec. 3. That the rates of postage on air mail shall not be less than 10 cents for each ounce or fraction thereof.

Sec. 4. That the Postmaster General is authorized to contract with any individual, firm, or corporation for the transportation of air mail by aircraft between such points as he may designate at a rate not to exceed four-fifths of the revenues derived from such air mail, and to further contract for the transportation by aircraft of first-class mail other than air mail at a rate not to exceed four-fifths of the revenues derived from such first-class mail.

Act of April 29, 1930, 46 Stat. 259:

* * * The Postmaster General is authorized to award contracts for the transportation of air mail by aircraft between such points as he may designate to the lowest responsible bidder at fixed rates per mile for definite weight spaces, one cubic foot of space being computed as the equivalent of nine pounds of air mail, such rates not to exceed $1.25 per mile: *Provided*, That where the air mail moving between the designated points does not exceed twenty-five cubic feet, or two hundred and twenty-five pounds, per trip the Postmaster General may award to the lowest responsible bidder, who has owned and operated an air transportation service on a fixed daily schedule over a distance

of not less than two hundred and fifty miles and for a period of not less than six months prior to the advertisement for bids, a contract at a rate not to exceed 40 cents per mile for a weight space of twenty-five cubic feet, or two hundred twenty-five pounds. Whenever sufficient air mail is not available, first-class mail matter may be added to make up the maximum load specified in such contract.

Air Mail Act of 1934, 48 Stat. 933:

Sec. 2 (a) Effective July 1, 1934, the rate of postage on air mail shall be 6 cents for each ounce or fraction thereof.

(b) When used in this Act—

(1) The term 'air mail' means mail of any class prepaid at the rate of postage prescribed in subsection (a) of this section.

• • • • • • •

Sec. 3 (a) The Postmaster General is authorized to award contracts for the transportation of air mail by airplane between such points as he may designate, and for initial periods of not exceeding one year, to the lowest responsible bidders tendering sufficient guaranty for faithful performance in accordance with the terms of the advertisement at fixed rates per airplane mile: • • •

Civil Aeronautics Act of 1938, 52 Stat. 973 et seq. (49 U.S.C. 401 et seq.):

Section 1. As used in this Act, unless the context otherwise requires—

• • • • • • •

(23) 'Mail' means United States mail and foreign-transit mail.

* * * * * * *

Sec. 2. In the exercise and performance of its powers and duties under this Act, the Authority shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.

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Sec. 405.

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(g) From and after the issuance of any certificate authorizing the transportation of mail by aircraft, the Postmaster General shall tender mail to the holder thereof, to the extent required by the Postal Service, for transportation between the points named in such certificate for the transportation of mail, and such mail shall be transported by the air carrier holding such certificate in accordance with such rules, regulations, and requirements as may be promulgated by the Postmaster General under this section.

* * * * * * *

(k) In the event of emergency caused by flood, fire, or other calamitous visitation, the Postmaster General is authorized to contract, without advertising, for the transportation by aircraft of any or all classes of mail to or from localities affected by such calamity, where available facilities of persons authorized to transport mail to or from such localities are inadequate to meet the requirements of the Postal Service during such emergency. Such contracts may be only for such periods as may be necessitated, for the maintenance of mail service, by the inadequacy of such other facilities. No operation pursuant to any such contract, for such period, shall be air transportation within the purview of this Act. Payment of compensation for service performed under such contracts shall be made, at rates provided in such contracts, from appropriations for the transportation of mail by the means normally used for transporting the mail transported under such contracts.

* * * * * * *

Sec. 1107.

(a) Section 3964 of the Revised Statutes is hereby amended by adding "and all air routes", after the words "or parts of railroads."

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(k) Sections 2(b)(2) and (3), 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, and 21, and so much of section 8 as reads . . ., of the Act of June 12, 1934, as amended (48 Stat. 933); . . . and all other Acts or parts of Acts inconsistent with any provision of this Act are hereby repealed.

Transportation Act of 1940, 54 Stat. 899 (49 U.S.C. preceding section 1):

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and

of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Act of October 14, 1940, 54 Stat. 1175 (39 U.S.C. 488a):

• • • whenever required by the Postmaster General, any air carrier authorized by the Civil Aeronautics Authority under title IV of the Civil Aeronautics Act of 1938 to engage in the transportation of mail in the Territory of Alaska shall, within the limits of such authorization, transport, in addition to mail on which postage shall have been paid at the rate provided by the Act of June 12, 1934 (48 Stat. 933), as amended, any other classes of mail bearing the appropriate postage for its respective class, and the Postmaster General is authorized to require such transportation.

Act of August 14, 1946, 60 Stat. 1062 (39 U.S.C. 462a):

Sec. 2. As used in this Act, "domestic air mail" shall embrace all mailable matter being transported as mail by air within the continental United States, within any Territory or possession of the United States, within any geographical area which is a protectorate of the United States, or between any of the aforesaid: • • •

Postal Rate Revision and Federal Employees Salary Act of 1948, 62 Stat. 1261 (39 U.S.C. 463a):

Sec. 201. The rate of postage on all domestic air mail as defined in Public Law 730, Seventy-ninth Congress, shall, except in the case of postal cards and private mailing or post cards, be 6 cents for each ounce or fraction thereof. The rate of postage on postal cards and private mailing or post cards . . ., when sent by air mail, shall be 4 cents each.

Air Parcel Post Act, 62 Stat. 1097 (39 U.S.C. 475):

> • • • the rate of postage on mailable matter exceeding eight ounces in weight, but not weighing more than seventy pounds nor measuring more than one hundred inches in length and girth combined, when carried by air and including other transportation to and from air mail routes, shall, except as otherwise herein provided, be determined on the basis of the eight postal zones established for fourth-class matter, as follows: • • •

Air Star Route Act, as amended, 63 Stat. 680 (39 U.S.C. 470):

> Sec. 6(a). Whenever he shall find it to be in the public interest, because of the nature of the terrain, or the impracticability or inadequacy of surface transportation, and where the cost thereof is reasonably compatible with the service to be provided, the Postmaster General may award contracts for the transportation by aircraft upon star routes of any or all classes of mail (including but not limited to air mail and air parcel post), payment for such service to be made from the appropriation for inland transportation by star routes: • • •

APPENDIX B

Before EDGERTON, Chief Judge, and PRETTYMAN and BASTIAN, Circuit Judges.

PRETTYMAN, *Circuit Judge:* This is an action brought in the District Court by certain railroads for declaratory judgment and injunctive relief against the Postmaster General. It was alleged in the complaint that the Postal Service has conducted an experimental operation in the trans-

portation of first-class (three-cent) mail by air between designated localities since early October, 1953; and that on October 6, 1954, the Postmaster General filed a petition with the Civil Aeronautics Board asking the Board to establish a rate of compensation for such transportation between additional localities, some or all of which are served by one or more of the plaintiff railroads. The railroads asserted that the proposed service is unlawful, void, and beyond the statutory authority of the Postmaster General. The Postmaster General answered. Both sides moved for summary judgment. The District Court granted summary judgment to the plaintiff railroads. It held that the Postmaster General has the right to experiment in the transportation of mail but that prolonged experimental dispatch of three-cent mail by air is not within his statutory authority. At the same time, the court denied the railroads' motion for a permanent injunction, on the ground that irreparable injury had not been shown. The Postmaster General appealed, and the railroads then appealed from those parts of the court's order which sustained the power to experiment provided the operation were not unduly prolonged, and from that part of the order denying the permanent injunction.

The West Coast experiment is the fourth such operation to be instituted. The plan is to tender to air carriers for transportation ordinary first-class mail when, as and if empty space is available on a flight after all other traffic, including mail bearing the special air-mail postage, is accommodated. Ordinary mail thus transported is not to receive expedited handling, transportation or distribution. The object of the experiments, the Postmaster General says, is to gain experience from which it can be determined whether improvements and economies might be achieved by this method.

We are met first with the contention of the Postmaster

General that the plaintiff railroads have no standing to sue, that is, that they have no right to initiate judicial inquiry into the legality of his action. He argues the statutes bestow on the railroads only a right to reasonable compensation for services actually performed; they give the railroads no right to perform these services; but the lawsuit seeks to protect a right to perform. Further, the Postmaster General says the plaintiffs have no common-law right to contest his action, since they are merely competitors of the airlines within the rule laid down in such cases as *Alabama Power Co.* v. *Ickes*[1] and *Kansas City Power & Light Co.* v. *McKay.*[2]

The carriage of mail by the railroads is governed by statute.[3] All railroad common carriers are required to carry such mail as may be offered for transportation by the Postmaster General,[4] and they are required to furnish all necessary facilities for carrying and handling the mail while it is in their custody, furnishing cars, station space, and rooms for handling storage and transfer.[5] They must carry the mail on the trains and in the manner the Postmaster General prescribes.[6]

The statute imposes substantial obligations on the plaintiff railroads. Under its terms they have been compelled to make substantial investments in special equipment for handling and carrying the mails. A necessary effect of the Postmaster General's action in tendering three-cent mail for transportation by air is to prevent useful employment of parts of these very considerable investments. Thus, contrary to the contentions of the Postmaster General, more

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[1] 302 U.S. 464, 82 L. Ed. 374, 58 S. Ct. 300 (1938).
[2] 95 U.S. App. D.C. —, 225 F. 2d 924 (D.C. Cir. 1955), *cert. denied*, — U.S. — (Nov. 7, 1955).
[3] 39 STAT. 425 (1916), 39 U.S.C.A. §§ 524 *et seq.*
[4] 39 STAT. 429 (1916), 39 U.S.C.A. § 541.
[5] 39 STAT. 427 (1916), 39 U.S.C.A. § 538.
[6] 39 STAT. 428 (1916), 39 U.S.C.A. § 539.

is at stake than a simple statutory privilege of doing business with the Government. The interest of the plaintiff railroads is not a mere expectancy of continued patronage. It is a present interest stemming from substantial investments in cars and equipment. Such an interest may merit legal consideration even when the investment is made freely and with knowledge of a possible change of status that would impair its use.[7] If so, it is sufficient here, for the railroads did not acquire these facilities as merely useful or needed in obtaining Government business; they acquired the equipment because they were commanded to do so by law.

Nor can the contested action of the Postmaster General be viewed only as creating competition for the railroads. In the first place the air carriers and the railroads do not bid for the mail as free competitors. They transport it as agents of the United States,[8] subject to minute regulation by the Postmaster General. Furthermore, the Postmaster General did not simply finance or create new competition; he explicitly discontinued the use of certain railroad equipment. For example, in the record before us is a letter in which the Postal Transportation Service at San Francisco advised the Southern Pacific Company that certain apartments in various trains would be discontinued. This is a direct act which is part and parcel of the experimental program for transportation of three-cent mail by air. If the program is invalid for want of statutory authority the plaintiff railroads have been injured by a direct illegal

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[7] See, *e.g.*, Standard Airlines v. Civil Aeronautics Board, 85 U.S. App. D.C. 29, 177 F. 2d 18 (D.C. Cir. 1949); Civil Aeronautics Board v. American Air Transport, 91 U.S. App. D.C. 318, 201 F. 2d 189 (D.C. Cir. 1952) (certified to Supreme Court), *certificate dismissed*, 344 U.S. 4, 97 L. Ed. 4, 73 S. Ct. 2 (1952), *appeal decided*, 91 U.S. App. D.C. 323, 201 F. 2d 194 (D.C. Cir. 1952).

[8] Atchison, T. & S. F. Ry. v. United States, 225 U.S. 640, 56 L. Ed. 1236, 32 S. Ct. 702 (1912).

act. The situations presented in cases like *Alabama Power Co.* v. *Ickes, supra,* were wholly different, and such cases do not apply. We think the plaintiff railroads have standing in court to challenge the alleged illegal act.

We come, then, to the question whether the Postmaster General has authority to conduct the experimental carriage of three-cent mail by air. His general authority to arrange for mail transportation stems from a statute which provides: "The Postmaster General shall provide for carrying the mail on all post roads established by law, as often as he, having due regard to productiveness and other circumstances, may think proper."[9] By a later enactment "air routes" were added to the definition of "post roads established by law".[10] More specific are the provisions of the Civil Aeronautics Act.[11] That Act requires the Postmaster General to tender mail to air carriers holding a certificate authorizing the transportation of mail by aircraft according to the needs of the Postal Service, and requires the carriers to transport such mail. It also provides that rates of compensation to air carriers for carrying the mail be fixed by the Civil Aeronautics Board.[12]

The position of the plaintiff railroads is quite simple. They say the foregoing provisions relate to so-called "air mail" and to no other mail. Another statute establishes the rate of postage on "domestic air mail" at six cents an ounce,[13] and "domestic air mail" is defined in the statute as "all mailable matter being transported as mail by air within the continental United States".[14] The rail-

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[9] Rev. Stat. 3965, 39 U.S.C.A. § 483.
[10] 52 Stat. 1027 (1938), 39 U.S.C.A. § 481.
[11] 52 Stat. 977 (1938), as amended, 49 U.S.C.A. § 401 *et seq.*
[12] 52 Stat. 998 (1938), as amended, 49 U.S.C.A. § 486.
[13] 62 Stat. 1261 (1948), 39 U.S.C.A. § 463a.
[14] 60 Stat. 1062 (1946), 39 U.S.C.A. § 462a.

roads therefore argue that "all mailable matter being transported as mail by air" must bear postage at the six-cent rate. These postage-rate provisions, say the railroads, are clear, without ambiguity, and must be given the effect their words require. They are in accord, say the railroads, with the distinction between ordinary surface mail and air mail which has consistently been recognized by legislative and executive authorities prior to the inauguration of the present experimental service.

In support of his authority the Postmaster General urges a number of propositions. He points to his general authority to provide for the carriage of mail on all post roads, including air routes, and to the provisions of the Civil Aeronautics Act to which we have referred. More specifically, he urges contemporaneous legislative approval of the experimental program manifested in committee reports [15] and the 1954 Post Office Appropriation Act.[16] Finally he cites an administrative distinction between air mail, as a special service receiving expedited handling and attention, and ordinary three-cent mail, which receives no special handling whether or not carried by air under this experiment. He claims support in a formal opinion of the Comptroller General [17] supporting the experimental program so long as this distinction is maintained.

The principal problem is whether the statutes fixing an air-mail postage rate and defining "domestic air mail" prohibit carriage by air of mail not bearing the special air-mail rate of postage. The railroads rely heavily upon the statutory definition of "domestic air mail". The complete section containing the definition is as follows:

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[15] *E.g.*, S. Rep. No. 1286, 83d Cong., 2d Sess. (1954).

[16] 68 Stat. 144.

[17] Letter of Aug. 12, 1953—B-116331—appearing in this record at page 288 and printed in the joint appendix at page 68.

> "As used in this Act, 'domestic air mail' shall embrace all mailable matter being transported as mail by air within the continental United States, within any Territory or possession of the United States, within any geographical area which is a protectorate of the United States, or between any of the aforesaid: *Provided,* That with respect to mail transported under authority of section 1 of the Act of October 14, 1940 (54 STAT. 1175; 39 U.S.C., 1940 edition, 488a), the postage rate of 5 cents for each ounce or fraction of an ounce shall be applicable only to mail of the first class, and for all other classes the rates shall be as prescribed by that Act."

The railroads reason, as we have said, that "all mailable matter being transported as mail by air" is "air mail" and the special postage is required to be paid on all matter thus transported. They conclude from those premises that mail not bearing the special postage cannot be transported by air. But we think the argument overlooks an important factor. Congress had, prior to the above-quoted definition, already defined "air mail" as being mail on which special air-mail postage has been prepaid. Under that definition "air mail" is not such matter as the Post Office transports by air but is matter upon which the sender has affixed special postage; the nature of the mail as air mail is fixed by the sender, not by the Postal Service. If that view is correct, the statutory definition of "domestic air mail" above quoted does not preclude the Post Office from transporting by air matter other than "air mail". It must, generally speaking, transport by air matter to which the special postage has been affixed, but it not required to demand the special postage for all matter which it transports by air.

An interesting problem in statutory construction is posed

by the railroads' argument in this respect. The several steps are long and complicated, and we have relegated the recital to an Appendix to this opinion. Our conclusion from the legislative history is that Congress in 1946 meant to use the words "air mail" in the sense it had already given those words and by adding "domestic" it intended merely to add a geographical description extending the continental postage rate to carriage of mail to the territories, possessions and protectorates of the United States. This is the plain, commonsense view. The only contrary consideration is that in 1946 Congress did not in words carry forward the 1925 and 1934 definitions but left them hanging without any practical application. In the absence of clear indication of a Congressional intent to discard the established definition, we think the view urged by the railroads is untenable.

Moreover, to accord "domestic air mail" the meaning urged by the railroads would give rise to serious statutory conflicts. Before 1946, for example, several statutes had been enacted expressly authorizing the Postmaster General to contract, in certain situations, for the carriage of "any or all classes of mail" by aircraft. One statute [18] authorized such contracts in emergencies caused by flood, fire, or calamitous visitation; another [19] granted similar authority to provide for air transportation over otherwise inaccessible or impracticable routes. If the subsequent definition of "domestic air mail" required all mail carried by air to bear air-mail postage, authority to contract for "any or all classes of mail" under these prior statutes was thereby terminated. Under that view of the definition the Postmaster General, whatever the emergency or the terrain, could contract only for mail bearing the special postage, since any mail carried by air under these

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[18] 52 STAT. 997 (1938), 49 U.S.C.A. § 485(k).

[19] 52 STAT. 219 (1938), as amended, 39 U.S.C.A. § 470.

contracts would be "domestic air mail" and would require the added postage. Congress in 1946 indicated no intention to nullify these prior statutes.

Other considerations support the foregoing view. The obvious purpose of imposing the higher rate of postage for "air mail" was to insure revenue proportionate to higher costs. Real air-mail service, for which the higher rate is charged, involves many priorities, and they are costly. The carriers must transport this mail on an imperative priority basis. Nothing in the record suggests that the mere means of transportation, air as compared to rail, would justify the surcharge. Indeed, so far as the record indicates, the variation in cost between carriage by rail and carriage by air on a non-priority, space-available basis is not substantial. We think the special surcharge for "domestic air mail" implies a special service. The Senate Committee Report of 1946[29] recited the disparity between the three-cent surface rate and the then eight-cent air rate, called that disparity a "penalty", and indicated the purpose of the five-cent-rate statute as follows:

> "Therefore, H. R. 5560 [which became the postage-rate statute] proposes to remove the penalty and put these two services, surface and air, on approximately equal footing—*the mailer to take his choice in accordance with the importance of his communications*." (Emphasis supplied.)

Under the present experimental program a person mailing an article with three cents postage does not receive any special service "in accordance with the importance of his communications". Indeed, while his mail may be carried by an air carrier, it may receive slower service than

[29] S. Rep. No. 1834, 79th Cong., 2d Sess.

if carried by rail, since such mail is handled by the air carriers on a basis of space when, as and if available.

Statutes relating specifically to the authority of the Postmaster General to provide for mail transportation are consistent with our conclusion. As we have noted, the Postmaster General is authorized to arrange for the transportation of mail on all post roads established by law, including air routes. Standing alone this general authorization might not be persuasive,[21] but the Civil Aeronautics Act, in requiring the Postmaster General to tender "mail"[22] to air carriers, does not limit that term to "air mail"; it provides generally that he shall tender "mail" to "the extent required by the Postal Service".

Quite important, so far as this specific program is concerned, is the fact that Congress has been fully cognizant of its inauguration and in the appropriation for the Post Office Department in 1954 inserted a proviso requiring reports to include "the total cost of the eliminated and replacement service for airline, truck, and railroad transportation."[23] The plaintiff railroads urge that this is not sufficient to manifest ratification and approval by the Congress and claim the cases cited by the Postmaster General on the point[24] are distinguishable. But we are unable to find any prohibition of the present experimental program, while we do find statutory provisions broad enough to encompass it within their terms. Under these circumstances

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[21] Beach v. United States, 226 U.S. 243, 257, 57 L. Ed. 205, 33 S. Ct. 20 (1912).

[22] "Mail" is defined in the Act as "United States mail and foreign-transit mail." 52 STAT. 979 (1938), 49 U.S.C.A. § 401(23). Thus in this statute the term "mail" has no special limitations.

[23] 68 STAT. 148.

[24] Brooks v. Dewar, 313 U.S. 354, 85 L. Ed. 1399, 61 S. Ct. 979 (1941); Fleming v. Mohawk Co., 331 U.S. 111, 91 L. Ed. 1375, 67 S. Ct. 1129 (1947); Wells v. Nickles, 104 U.S. 444, 26 L. Ed. 825 (1881); Swayne & Hoyt, Ltd. v. United States, 300 U.S. 297, 81 L. Ed. 659, 57 S. Ct. 478 (1937).

we think the indications of implied legislative approval are entitled to weight. In sum we conclude that the experimental program for carrying ordinary first-class mail by air is within the statutory authority of the Postmaster General and is authorized by law.

The judgment of the District Court will be vacated and the case remanded with instructions to grant defendant Postmaster General's motion for summary judgment.

Judgment vacated and case remanded.

BASTIAN, CIRCUIT JUDGE, concurring in the result: I agree with the holding of the court that the Postmaster General has the authority to conduct experimental carriage of three-cent mail by air. I have doubts, however, as to the standing of the railroads to sue.

APPENDIX

This Appendix is a study of the definition of "air mail" in connection with the prescription of postage rates.

In 1925 Congress enacted a short statute, 43 STAT. 805, five one-sentence sections, titled "Air Mail Act". That statute defined "air mail" thus: "That when used in this Act the term 'air mail' means first-class mail prepaid at the rates of postage herein prescribed." The rate was prescribed at ten cents an ounce. In the United States Code (1926) the "air mail" definition was codified as Section 462 of Title 39. It remains there today, with a change we shall mention in a moment. The postage rate provision was codified as Section 463 of the same Title.[1]

[1] In 1928 the rate was changed to 5 cents. 45 STAT. 594. In 1926, 44 STAT. 692, 1928, 45 STAT. 594, and 1930, 46 STAT. 259, the section of the 1925 Act relating to the contracting authority of the Postmaster General was amended and other sections added. In 1934, 48 STAT. 933, that section of the 1925 Act and the added sections were repealed. Those changes are immaterial here.

In 1934 Congress, without expressly repealing either the "air mail" definition or the postage rate section of the 1925 Act, enacted another definition of "air mail" and another postage rate provision. The new definition was substantially the same as the old. It read, Sec. 2(b)(1), 48 STAT. 933:

> "(b) When used in this Act—
>
> "(1) The term 'air mail' means mail of any class prepaid at the rate of postage prescribed in subsection (a) of this section."

The latter subsection was the postage rate provision. The codifiers (1940 edition) handled this Congressional action in mixed fashion. They treated the new postage provision as superseding the old provision and thus placed it as Section 463. But they included both definitions of "air mail", leaving the old as Section 462 and adding the new as Section 469. Moreover they made both definitions applicable to the postage rate section, Section 463; translating the statutory language they made each definition read "When used in sections 463 [etc.]"

In the Civil Aeronautics Act, 52 STAT. 1029 (1938), Congress repealed most of the provisions of the 1934 Act relating to air mail but left the rate and definition sections intact. In the Revenue Act of 1943, 58 STAT. 69, the postage rate was increased two cents. Thus in 1946 the rate on air mail stood at eight cents. The committees of the Congress were of opinion that the disparity between this "premium air-mail rate" and the surface rate of three cents was too great. S. REP. No. 1834, 79th Cong., 2d Sess. (1946). Also, a problem had arisen as to the rate to territories and possessions of the United States. The Senate Committee discussed these problems in its report. In doing so it used the term "air mail"

without definition, as though it were a known term, discussed the postage rate problem, and recommended an extension of the continental rate to the territories, etc.; but nowhere did it mention any intent to circumscribe or change the then existing powers of the Postmaster General. Thereupon Congress enacted another short statute, 60 STAT. 1062 (1946), three one-sentence sections, which prescribed the rate on domestic air mail at five cents (changed to six cents by a 1948 Act, 62 STAT. 1261) and defined domestic air mail as we have quoted it in the text of this opinion. But the draftsmen of this 1946 statute did not include a provision fitting the new provisions into existing law or making the new act amendatory of or supplementary to the old; they left the new provisions as a separate and independent piece of legislation.

The codifiers (1946 edition) at first treated the new postage section (fixing the rate on "domestic air mail") as superseding the old, putting it in as Section 463.[2] They left both of the definitions of "air mail" in the Code as they had theretofore been, Sections 462 and 469, and left both referring to the postage section, Section 463. They inserted the new definition of "domestic air mail" as a new section, Section 462a. Thus it is clear that as of that time, so far as the United States Code was concerned, the definition of "air mail" applied to the use of those two words in the phrase "domestic air mail". As we have already said, we think that was correct.

In 1948 Congress changed the law respecting post cards sent by air, setting that rate at four cents. 62 STAT. 1261. On all other matter Congress prescribed a six-cent rate. When the codifiers put this statute in the Code (Supp. II to 1946 Code), they did not treat it as superseding the old postage rate section, Section 463; they added it as a

[2] In their explanatory comments the codifiers said the new provision "amended" the old.

new section, Section 463a, and dropped Section 463 out of the Code. But they did not make a corresponding change in the definitions of "air mail". So Section 462 is made to apply to Sections 461 (the Short Title section), 462 (the definition itself), and 465 (having to do with rules and regulations). And the other definition, Section 469, is made to apply to Section 463 (which is not in the Code at all) and Section 469f (which relates to claims on account of annulled contracts). So the Code makes it appear that neither definition of "air mail" applies to the postage rate provision. Moreover the codifiers made the "air mail" definition in Section 462 read as meaning mail prepaid at the rates "prescribed in sections 461, 462 and 465 of this title." No postage rates are prescribed in any of those sections. And they made the definition in Section 469 read as meaning mail prepaid at the rate "prescribed in section 463 of this title." As we have pointed out, there was no Section 463 left in the Title. We find nothing in any statute or in any legislative history which justifies this change, if it is intended to be a change, in the statutes made in the course of codification.

The essence of the contention of the railroads on this point is that when Congress defined "domestic air mail" in 1946 it did not mean to use the term "air mail" as the term was already defined by statute but meant to redefine that term as well as to add the word "domestic". Nothing in the legislative history, so far as we can find, justifies that view. Our view on the point is as we have stated it in the text of this opinion.

APPENDIX C

Before Edgerton, Chief Judge, and Prettyman and Bastian, Circuit Judges

JUDGMENT

These appeals came on to be heard on the record from the United States District Court for the District of Columbia, and were argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in these cases be, and the same is hereby, vacated, and these cases be, and the same are hereby, remanded to the said District Court with instructions to grant defendant Postmaster General's motion for summary judgment.

Dated: December 12, 1955.

Per Circuit Judge Prettyman.

Separate opinion by Circuit Judge Bastian concurring in the result.